

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Applications of

The Lutheran Church/Missouri Synod)	MM Docket No. 94-10
)	
For Renewal of Licenses of Stations)	File Nos. BR-890829VC
KFUO/KFUO-FM, Clayton, Missouri)	BRH-890929VB

TO: Hon. Arthur Steinberg, Administrative Law Judge

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
THE MISSOURI STATE CONFERENCE OF BRANCHES OF
THE NAACP, THE ST. LOUIS BRANCH OF THE NAACP,
AND THE ST. LOUIS COUNTY BRANCH OF THE NAACP**

VOLUME I

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INTRODUCTION

1. The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP (collectively "NAACP") respectfully submit their findings and conclusions in response to the HDO, 9 FCC Rcd 914 (1994).

2. The NAACP does not seek the licenses of the radio stations at issue here, KFUE(AM) and KFUE-FM ("the Stations"). As a civil rights organization, it seeks to defend St. Louis radio listeners from discrimination as practiced by the licensee, The Lutheran Church/Missouri Synod ("KFUE").^{1/}

3. The NAACP's participation began on January 2, 1990, with the filing of its Petition to Deny the Stations' 1989 license renewal applications. MMB Exhibit 3. The Petition alleged, inter alia, that the Stations discriminated in employment and violated the affirmative action provisions of the EEO Rule.

4. The EEO Branch conducted an investigation pursuant to Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621 (D.C. Cir. 1978) ("Bilingual II"). The investigation involved four inquiry letters sent between January 4, 1990 and November 17, 1992. MMB Exs. 4, 5, 8 and 13. Based on its investigation, the Commission issued an HDO which designated the following issues for trial:

- (1) To determine the extent to which the licensee of Stations KFUE/KFUE-FM complied with the affirmative action provisions specified in Section 73.2080(b) of the Commission's Rules, 47 C.F.R. §73.2080;

^{1/} References herein to "KFUE" refer to the The Lutheran Church/Missouri Synod in its role as a radio station licensee. The Lutheran Church/Missouri Synod, in its role as a Protestant denomination, is referred to as the "Synod."

- (2) To determine whether the licensee of Stations KFUE/KFUE-FM made misrepresentations of fact or was lacking in candor in violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. §73.1015, with regard to the stations' EEO program and documents submitted in support thereof;
- (3) To determine whether, in light of evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience and necessity.

HDO, pp. 925-26 ¶32.

5. The HDO placed the burden of proceeding and the burden of proof on KFUE. HDO, p. 926 ¶33. Thus, the NAACP's Findings of Fact make special note of factual matters which KFUE did not prove as well as those on which it did offer evidence.

6. The HDO stated that "irrespective of whether the hearing record warrants an Order denying the renewal applications...it shall be determined, pursuant to Section 503(b), whether an **ORDER FOR FORFEITURE** in an amount not to exceed \$250,000 shall be issued against The Lutheran Church/Missouri Synod for the willful and/or repeated violations of Commission Rules Section 73.2080 (establishing and maintaining an affirmative action policy) and Section 73.1015 (submitting truthful statements to the Commission.)^{2/} HDO, p. 927 ¶37 (emphasis in original).

7. In response to a motion filed by the NAACP, the Court modified issue (1) to read:

^{2/} The HDO included a reference to Section 1.91 and 1.92 of the Rules, which apply only to revocation proceedings and cease and desist orders. HDO, p. 926 ¶35. At the Bureau's request, these references were deleted by MO&O, FCC 94M-111 (released March 3, 1994).

- (1) To determine the extent to which the licensee of Stations KFUD/KFUD-FM complied with the nondiscrimination and affirmative action provisions specified in Sections 73.2080(a) and 73.2080(b) of the Commission's Rules, 47 C.F.R. §73.2080[.]

MO&O, FCC 94M-191 (released March 25, 1994), p. 2.

8. The hearing was held in Washington, D.C. from June 20-24, 1994. The record was reopened on July 14, 1994 to admit Joint Exhibit 2 and amended NAACP Exhibit 15. Order, 94M-443 (released July 14, 1994). The record was thereupon closed.

FINDINGS OF FACT

A. Background on the Stations and their Governance

9. The licensee, The Lutheran Church/Missouri Synod, is the seventh largest Protestant body and the second largest Lutheran body in the United States. MMB Ex. 14, p. 26.

10. KFUD(AM) is a noncommercial AM station broadcasting religious programming. KFUD-FM is a commercial FM station broadcasting a classical music format with some religious programming. KFUD has owned KFUD(AM) since 1924 and has owned KFUD-FM since 1948. KFUD-FM is the only fulltime classical music station in the St. Louis radio market. KFUD Ex. 1, p. 1.

11. KFUD-FM began to accept commercials in March, 1983, one month into the license term. Id., p. 5 ¶9.

12. Before 1986, the Stations were operated by the Synod's Board for Lutheran Radio, which reported directly to the Synod's membership in Convention and to its Board of Directors. During that time, Rev. Paul Devantier, Executive Director of the Board for Communications Services, served as a liaison to the Stations. In 1986, the Synod assigned responsibility for the Stations to the Board for Communications Services, whereupon the Board for Lutheran Radio became a standing committee of the seven member Board for Communications Services. The effect of this restructuring was to make Devantier "the 'CEO' of the Stations." Id., p. 7 ¶¶13-14.

13. A further reorganization occurred in 1987. Its effect was that the position of Director of Broadcast Ministries was created, reporting to Devantier and supervising the general managers of each of the Stations. Id., p. 8 ¶15.

**B. The EEO Branch's Predesignation Investigation
And the Hearing Designation Order**

14. To understand the scope of the issues, some background on the EEO Branch's investigatory letters and how they are reflected in the HDO is appropriate. This background is offered to make clear the extent to which KFUD had notice of the full range of the Commission's concerns.

15. Even before receiving the Petition to Deny, the EEO Branch asked KFUD to supplement its applications with details about recruitment efforts, as well as minority and female referrals -- data not contained in the applications. See HDO, p. 916, ¶8. Apparently that request was made by telephone. See MMB Ex. 2, p. 1.

16. KFUD supplemented the renewal applications on December 29, 1989. MMB Ex. 2. The HDO characterized KFUD's supplement as follows:

In its supplement, filed December 29, 1989, the licensee indicated that it sent general recruitment letters to three employment/personnel agencies and six educational institutions during the license term, but received no minority referrals. ^{5/} It described some minority specific recruitment efforts taken in the last several months of the license term, reiterating that it hired six persons, all for upper-level positions, from October 1, 1988 to September 30, 1989 [fn. omitted].

^{5/} We note that the sample recruitment letter, dated July 18, 1989, and appended to the supplement, refers only generally to job openings at KFUD(FM). The letter does not reference any specific types of vacancies at the station, nor does it indicate the type of skills or educational level required for any jobs at the station. The licensee states therein that it seeks minority and female referrals and will contact the source as job openings occur.

HDO, pp. 916-17, ¶8.

17. On January 4, 1990, two days after the NAACP filed its Petition to Deny, the EEO Branch sent KFUD the first of its four Bilingual letters. MMB Ex. 4. It stated that "there is insufficient information to make a determination that efforts were undertaken to attract Black applicants whenever there were job openings[.]" It then requested, for each position filled from October 1, 1986 through September 30, 1989, the job title, Form 395-B job classification, full or parttime status of the position, the date the position was filled, the referral sources contacted for the position, the number of persons interviewed by race and sex, and the referral source, gender and race or national origin of the successful candidate. Id.

18. The HDO found several points in KFUD's February 23, 1990 Opposition to the NAACP's Petition to Deny ("February 23, 1990 Opposition") (found in the record at KFUD Ex. 4, Tab 7) worthy of mention. The HDO noted that the Opposition had argued that KFUD had used multiple referral sources during the license term, not just employment agencies; that KFUD received many write-in candidates due to the specialized nature of the formats; that KFUD had what the HDO characterized as a "reciprocal arrangement with [Concordia Seminary] to provide broadcast training to seminary students and their spouses in exchange for rent free studios"; that seminary students fill what the HDO termed "non-specialized positions (job which do not require theological training or classical music expertise)" and that "according to the licensee, management turnover has made it difficult to maintain a consistent recruitment program." HDO, p. 917, ¶10.

19. The HDO added that

[t]he licensee explained that its formats require that nearly all upper-level positions (i.e., the majority of its jobs) be filled with persons with classical music expertise or theological training....The licensee stated that a recent audit of KFUE(FM)'s listeners revealed that 3.7% (or 2,693) are Black. It reasoned that the FM station's Black audience (which it calculated as .1% of the overall St. Louis population), represented the total local availability of minorities with classical music training." Id., pp. 917-18, ¶11.

20. The HDO also noted that the February 23, 1990 Opposition acknowledged but did not explain a major discrepancy in the applications, which reported six hires in the year preceding them, when there were really 14 hires. Finally, the HDO pointed out that the Stations "failed to identify recruitment contacts for each position, and the gender, race or national origin of those interviewed." Id., p. 918, ¶12.

21. On April 23, 1992, the EEO Branch sent KFUE its second Bilingual letter. MMB Ex. 5. That letter asked KFUE to state specifically when it contacted referral sources for its vacancies during the October, 1986 - September, 1989 review period. The letter also sought recruitment and hire data for each position filled between November 1, 1989 through January 31, 1990, the end of the license term. Id.; see also HDO, p. 918 ¶13.

22. KFUO's answer to this letter was filed on May 12, 1992. ("May 12, 1992 Letter"), MMB Ex. 6. The HDO noted that KFUO's May 12, 1992 letter acknowledged that KFUO "doesn't 'use outside recruitment sources for every opening at the stations,' because of the many unsolicited applications received and because the rent-free agreement with Concordia Seminary requires that it make special efforts to employ seminary students and their spouses 'without resort to outside recruitment sources.'" HDO, pp. 918-19, ¶14.

23. On June 26, 1992, the EEO Branch wrote KFUO its third investigatory letter. MMB Ex. 8. That letter sought, inter alia, further explanation for the discrepancy between the six hires reported in the renewal applications and the 14 persons actually hired. Id., p. 1; see HDO, pp. 919-20, ¶15.

24. KFUO responded by letter of July 13, 1992 ("July 13, 1992 Letter"). MMB Ex. 9. Therein KFUO said that the six hires/fourteen hires discrepancy derived from an employee's belief that the Form 396 question about the number of persons hired really sought the "net gain" during the period in question. MMB Ex. 9, p. 3; see HDO, p. 420 ¶15.3/

3/ The NAACP is not submitting detailed findings of fact on this point, which it views as ancillary to what this case is about. See 47 CFR §1.264 (person other than an applicant may submit findings and conclusions "limited to those issues...which affect the interests of such person.") The NAACP feels that if this were KFUO's only misrepresentation it would merit only a forfeiture. Furthermore, unlike other, deliberate misrepresentations in this case, this one may well be attributed simply to gross negligence on the part of a fairly junior employee, Paula Zika, who was not well supervised. As argued herein, other misrepresentations directly relating to discriminatory practices are far more germane to the purpose of the EEO Rule and far more probative of KFUO's qualifications than this six hires/fourteen hires discrepancy.

25. To understand this explanation, it should be noted that Form 396 contains no reference to "net gain." The application stated that "[d]uring the twelve month period beginning October 1, 1988 and ending September 30, 1989, we hired a total of six persons, two white males and four white females." 1989 Renewal Application, KFUE Ex. 4, Tab 16, p. 7, Section VII (Job Hires). In its December 29, 1989 Supplement, KFUE added that

[a]s stated in the renewal application, during the twelve month period beginning October 1, 1988 and ending September 30, 1989, the station hired a total of six persons, two white males and four white females. All of these persons were hired for positions in the top four job categories. The two male employees and two of the female employees were hired for positions in the "Sales" category; a third female was hired for a position in the "Professionals" category; and the other female was hired for a position in the "Officials and Managers" category.

MMB Ex. 2, pp. 5-6.

26. At this point, the NAACP filed comments arguing that denial of the applications was required because of KFUE's "extremely low minority employment," "near absence of minority recruitment activity," "discriminatory use of religious as [a] false bona fide occupational qualification (BFOQ)," "heavy recruitment use of [an] educational institution [Concordia Seminary] with almost no Black students" and (referring to the "net gain" of six employees) a "misrepresentation in [the] renewal application." NAACP Letter to Glenn Wolfe, September 1, 1992, MMB Ex. 10. See HDO, p. 920, ¶16.

27. KFUE responded on September 21, 1992 with a "Motion to Strike and Reply to Comments" ("September 21, 1992 Motion to Strike"). MMB Ex. 11. The HDO observed that the Motion to Strike "claimed that standard broadcasting industry practice requires that salespersons at classical music stations possess knowledge about the format. Lastly, it termed its representation of the renewal year hires as six rather than the actual 14, as an 'understandable [albeit regrettable]' error." HDO, p. 920, ¶17.

28. The fourth Bilingual letter, dated November 17, 1992, began with these words:

This letter is to advise you of serious questions arising from the Commission's inquiry into the employment activity of Stations KFUE-AM/FM.

MMB Ex. 13, p. 1.

29. The EEO Branch's letter asked KFUE to provide an iteration of the duties, responsibilities and qualifications of persons hired from October 1, 1986 to October 1, 1989 which required either theological training or classical music expertise. It also asked for information on employee referrals from former employees or from the Synod's headquarters. Finally, it asked for an explanation of how not recruiting for positions because of the Concordia Seminary arrangement comported with KFUE's EEO Rule obligations. HDO, p. 920, ¶18; see MMB Ex. 13.

30. KFUD responded by letter on December 28, 1992 ("December 28, 1992 Response to FCC Inquiry"), MMB Ex. 14. KFUD represented therein that no resumes were on file for former employees. It "did not explain exactly" what theological training was required for its announcing employees. It represented that "no resumes were on file for its sales staff" and it "asserted that many of the sales staff were knowledgeable about classical music, 'although not all were.'" HDO, pp. 920-21, ¶¶19-20. The HDO noted that there were fourteen sales hires during the October, 1986 - September, 1989 period but KFUD had only provided data for two of them. Id., p. 921, n. 13.

31. The HDO then made several preliminary legal findings in the section of the HDO entitled "Discussion." HDO, pp. 921-24, ¶¶22-26. These findings included the following points regarding KFUD's EEO noncompliance, including discrimination:

- KFUD failed to recruit for four jobs because its arrangement with Concordia Seminary precluded affirmative, outside recruitment. Such an arrangement, which "results in lack of adherence to our EEO requirements because a station is getting rent free studios is unacceptable and contrary to our EEO policies." HDO, pp. 921-22 ¶22.
- KFUD's argument that minorities were unqualified for certain positions because of a lack of "Lutheran training" was "without merit because the record does not indicate that it ever used minority specific sources, or even widely circulated general sources, for five of seven AM vacancies where recruitment was performed....The licensee's conclusions about the qualifications of minorities in its MSA are speculative because it assumed its recruitment efforts would be unproductive without conducting any meaningful recruitment." HDO, p. 922, ¶23 (emphasis in original).

- KFUE's only efforts to fill positions with minorities occurred only "after the Commission initiated a more extensive review of the station's efforts and after the NAACP filed its challenge to the renewal applications. Thus, the licensee made its first efforts to recruit minority applicants only after its renewal applications and EEO program were questioned and challenged and then only for specific lower-level positions." HDO, p. 922, ¶24 (emphasis in original, fn. omitted).
- Fourteen of 18 KFUE-FM positions, including twelve sales job and two announcing positions, "were unrecruited" because KFUE claimed it "required its sales staff to have classical music expertise and it deemed only 2,693 Blacks in the St. Louis MSA (its Black listenership) had such training. However, not all of the sales staff met the requirement of classical music expertise and the licensee failed to explain under what circumstances it waived this requirement. Moreover, again the licensee has engaged in speculation about the qualifications of minorities without having conducted any recruitment. It appears that all of the 14 unrecruited positions were filled by church employees or persons referred by church employees" and of the four remaining vacancies, "only the lower-level position was announced to a minority specific source." Thus, the HDO concluded that "[i]t would appear that the licensee's reasons for its failure to conduct recruitment at the FM station are inherently discriminatory and not based on the results of any actual recruitment efforts." HDO, pp. 922-23, ¶25 (fn. omitted).

- KFUCO's "Lutheran training" and "classical music expertise" requirements were "vague, unascertainable" and "had a direct adverse impact on Blacks, foreclosing them initially from any employment with the stations and, subsequently, from upper-level employment. First, the fact that not all persons employed in sales positions had classical music expertise, at a minimum, raises questions about the bona fides of this criteria as a justification for not recruiting Blacks. Second, the licensee made no attempt to recruit minorities who did have classical music training. Third, the licensee's use of statistics on minorities with Lutheran training appears to evidence a preconceived notion about the suitability of minorities to perform certain jobs. Lastly, the licensee violated our EEO Rule in deference to its agreement with Concordia Seminary to employ seminary students and their spouses. The agreement with the seminary clearly abrogates our EEO Rule." HDO, p. 923, ¶26.

32. The HDO then made several preliminary legal findings on the question of "Misrepresentation/Lack of Candor." HDO, pp. 924-25, ¶¶27-30. These findings included the following points:

- "In its renewal applications and supplement, it appears the licensee misrepresented critical facts about its EEO program." The HDO referred specifically to the discrepancy between six hires in the application and supplement and the actual number of fourteen, and noted that it took three inquiries before the licensee finally offered an explanation. However, the HDO asserted that that explanation was bereft of substantiating data or records. Furthermore, the HDO noted that the error was material and favored the licensee: "without the challenge to its renewal applications, the licensee's recruitment and hire record would have appeared much better than it actually was. Because we must rely on truthful reporting by our licensees in assessing the success of an EEO program, we are particularly concerned when we find the actual number of hires is more than twice the number of hires repeatedly reported [citing cases]. HDO, p. 923, ¶27.

- "Moreover, the licensee has been less than forthcoming in responses to inquiries regarding the specifics of its EEO outreach efforts. It appears that the licensee lacked candor in its representation of its recruitment program. In its renewal applications, the licensee stated that it recruited for vacancies as they occurred and that they actively sought female and minority referrals." HDO, p. 924, ¶28. However, "KFUO/KFUO-FM's license term recruitment efforts were severely limited." The HDO referred to the "general recruitment letter" sent two and a half months prior to renewal (MMB Ex. 2, p. 8), to the use of minority recruitment sources only for lower-level positions, to the applications' silence regarding the Concordia agreement and requirements for Lutheran and classical music training, to the absence of references to any such requirements in the "general recruitment letter" and to KFUO's failure to "reveal these important factors about its recruitment program until it filed its opposition to the NAACP's petition. Without the challenge to its renewal application, the licensee's true EEO program and policies might not have been ascertained." HDO, pp. 924-25, ¶29.
- Finally, the HDO held that "it appears that the stations misrepresented their requirement of classical music expertise for its sales positions at KFUO(FM). The licensee described at length the scarcity of qualified minorities for sales vacancies; however, the record fails to demonstrate that all, or even most, salespersons hired during the license term met that requirement." HDO, p. 925, ¶30.

33. The HDO concluded its "Discussion" section this way:

Based on the foregoing, we conclude that a substantial and material question of fact exists as to whether and to what extent the licensee engaged in misrepresentation or lack of candor with respect to responses to Commission inquiries regarding the above matters in violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. §73.1015.

HDO, p. 925, ¶30.

34. The HDO's Conclusion section, preceding the Ordering Clauses, read as follows:

Based on the foregoing, we conclude that the licensee's submissions raise substantial and material questions of fact as to whether, in light of its inconsistent and erroneous responses, along with its failure to establish and maintain an equal opportunity policy, the licensee complied with Section 73.2080 of the Commission's Rules, 47 C.F.R. §73.2080; and whether it misrepresented or lacked candor in providing information to the Commission concerning its recruitment and employment history and practices. We conclude that KFUD/KFUD-FM's renewal applications should be designated for hearing.

HDO, p. 925, ¶31.

C. African American Employees And Job Applicants

1. Employment Of African Americans

35. Lula Daniels was the only African American employee who worked at KFUD(AM) above the level of a secretary or janitor during the license term. She was hired in the 1970's; at the start of the license term, her position was Coordinator of Worship Programming. She died on April 17, 1985. KFUD Ex. 7, p. 9 ¶18.

36. The only other African American employees hired before the 1989 license renewal applications were filed were secretaries or receptionists. They are: Ruth Clerkly (September 30, 1984 - December 26, 1986); Helen Richardson (March 26, 1985 to August 31, 1985); Lisa Harrison (August 28, 1985 to January 10, 1986); and Cynthia Blades (November 1, 1989 to April 20, 1990). KFUD Ex. 4, p. 14.

37. The FCC Form 395's filed by KFUD in each year of the license term reflect its employment "snapshot" as of January 31 of each year. NAACP Ex. 24. The number of minorities reflected in these reports, and the numbers of employees, are shown in Table 1.

TABLE 1

KFUD MINORITY EMPLOYMENT AS REPORTED ON FCC FORM 395

<u>End of Pay Period</u>	<u># Mins./#Empls., Fulltime, in the Top 4 Categories</u>	<u># Mins./#Empls., Total Fulltime</u>	<u># Mins./Empls. Fulltime and Parttime</u>
1/31/89	1/22	1/26	1/41
1/31/88	0/19	0/23	0/33
1/31/87	0/16	0/18	0/28
1/31/86	0/14	1/17	1/29
1/31/85	1/15	2/17	2/27
1/31/84	1/15	1/18	1/26
1/31/83	1/14	1/17	1/24

38. On January 30, 1990, a day before the end of the license term, KFUD hired Bridget Williams as a Secretary/Receptionist. KFUD Ex. 4, Tab 6, p. 8. On the next day -- the last day of the license term -- KFUD hired Timothy Meeks as a maintenance person. Id.

39. KFUD's list of the Stations' 43 fulltime and 41 parttime hires from February 1, 1983 to February 1, 1990 appears in KFUD Ex. 4, Tab 6. Each of the 41 persons hired parttime was White. Id., pp. 9-15.

40. The Commission's EEO Branch annually compiles a database summarizing all radio and TV stations' Form 395 data. The NAACP assembled, as NAACP Ex. 21, the pages of that database for the years 1983-1989 for all radio stations using a commercial classical format throughout this period, excluding those for which a co-situated (AM or FM) station used another format,^{4/} and excluding those not required to have an EEO program for minorities owing to workforce representation of minorities not exceeding 5%. See FCC Form 396 (version in effect through 9/30/90), Filing Instructions, KFUD Ex. 4, Tab 6, p. 2.

^{4/} KFUD(AM) does not have a classical format. Thus, it should be noted that one KFUD minority employee during the license term, Lula Daniels, was assigned only to KFUD(AM). The others worked for both stations in common. Consequently, the NAACP's analysis has the effect of making KFUD-FM's EEO record, relative to that of other classical stations, appear better than it really was.

41. In Table 2, which follows, the relevant stations' market representation of African Americans and of minorities as of 1990^{5/} are taken from the FCC's "1990 Census Data Summary Report: (P)MSA Total Percentages for Total Civilian Labor Force," March 31, 1993 (official notice requested.) Each MSA's total population as of April 1, 1990, according to the 1990 Census, is also provided (official notice requested).

TABLE 2

**MINORITY REPRESENTATION IN MARKETS
WITH COMMERCIAL CLASSICAL RADIO STATIONS**

<u>Station(s)</u>	<u>Market</u>	<u>Percent African Americans in the Workforce</u>	<u>Percent Minorities in the Workforce</u>	<u>Total MSA or PMSA Population</u>
KKGO-FM	Los Angeles, CA	9.5%	54.7%	8,863,000
KFSD-FM	San Diego, CA	4.9%	30.9%	2,496,000
KKHI-AM-FM	San Francisco, CA	5.8%	38.6%	1,604,000
KVOD-FM	Denver, CO	5.0%	18.7%	1,623,000
WTMI-FM	Miami, FL	17.0%	69.7%	1,937,000
WFMT-FM	Chicago, IL	17.7%	32.6%	7,411,000
WNIB-FM	Chicago, IL	17.7%	32.6%	7,411,000
WCRB-FM	Boston, MA	6.0%	12.6%	5,051,000
WQRS-FM	Detroit, MI	17.2%	20.4%	4,267,000
KFUO-AM-FM	St. Louis, MO	14.5%	16.7%	2,493,000
KXTR-FM	Kansas City, MO	10.8%	14.9%	1,583,000
WCLV-FM	Cleveland, OH	16.0%	21.0%	2,202,000
WFLN-AM-FM	Philadelphia, PA	16.3%	21.0%	4,922,000
WFMR-FM	Milwaukee, WI	9.8%	13.8%	1,432,000

^{5/} Because of the Census Bureau's endemic undercounting of minorities, and because 1990 is the year closest to one of the years of the license term, 1990 data probably represents the best (and certainly a fair) estimate of the minority presence in these markets. Furthermore, the percentage of minorities in the St. Louis MSA declined from 1980 to 1990, so KFUE presumably would benefit from the use of 1990 data for comparative purposes. Thus, any quibble over whether 1980 or 1990 data is used is immaterial. This data is presented only to show that St. Louis' African American and minority population representations were substantial, as they were in other markets with commercial classical stations.

42. The number of African Americans, minorities, and total employees in the top four job categories (officials and managers, professionals, sales workers and technicians) for each of these stations from 1983-1989 is given in Table 3.^{6/}

TABLE 3
TOP FOUR JOB CATEGORY MINORITY REPRESENTATION AT
RADIO STATIONS WITH COMMERCIAL CLASSICAL FORMATS

The data in this table is given in the format "X/Y/Z", where X is the number of African Americans working fulltime in the top four job categories, Y is the number of minorities (including African Americans) working fulltime in the top four job categories, and Z is the total number of persons of all races working fulltime in the top four job categories. "N.D.A." stands for "no data available." The 1989 figure for WCRB-FM is drawn from NAACP Ex. 16, which the NAACP moved into evidence by motion September 1, 1994.

<u>Station(s)</u>	<u>Years</u>						
	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
KKGO-FM	3/5/16	2/4/15	3/5/17	2/6/20	3/6/20	4/5/16	7/9/24
KFSD-FM	0/2/13	0/3/14	0/1/14	0/1/14	0/1/13	0/1/14	0/1/13
KKHI-AM-FM	1/2/19	N.D.A.	1/2/19	0/0/14	1/4/20	0/4/20	0/1/17
KVOD-FM	1/2/12	N.D.A.	1/1/14	1/1/15	1/2/17	0/1/15	0/1/14
WTMI-FM	1/2/13	2/4/16	2/4/16	3/5/17	2/4/15	2/3/15	2/4/17
WFMT-FM	7/8/44	8/9/43	7/8/47	6/7/43	5/6/44	5/6/47	5/7/50
WNIB-FM	1/1/8	1/1/10	1/1/9	1/1/11	1/1/11	1/1/11	1/1/10
WCRB-FM	0/2/38	0/2/36	1/3/39	1/3/38	1/3/41	1/3/44	1/2/46
WQRS-FM	0/0/16	0/0/16	0/0/17	1/1/13	0/0/15	0/0/15	1/1/12
KFUO-AM-FM	1/1/14	1/1/15	1/1/15	0/0/14	0/0/16	0/0/19	0/1/22
KXTR-FM	1/1/7	1/1/7	1/1/7	1/1/8	1/1/8	1/1/7	1/1/7
WCLV-FM	1/1/13	1/1/13	1/1/14	1/1/16	1/1/16	1/1/16	2/2/17
WFLN-AM-FM	2/2/22	N.D.A.	4/4/25	4/4/25	3/3/23	N.D.A.	2/2/17
WFMR-FM	0/0/7	0/0/9	0/0/11	N.D.A.	0/0/13	0/1/16	1/2/15

^{6/} This data reflects an annual "snapshot" of the stations' EEO profiles, and thus might exclude employees of any race who were not employed during the period reflected on the particular Form 395. Thus, the data is not perfect, but it can provide a useful indication of industry trends. Indeed, that is among the purposes for which Form 395 data is compiled. Nondiscrimination in Broadcasting, 23 FCC2d 430 (1970).

**2. Employment Applications
From African Americans**

43. KFUD's list of the Stations' hires shows the number of applicants for each position by race. KFUD Ex. 4, Tab 6. The list does not identify a single African American applicant except those who were selected noncompetitively and those who essentially competed only against other minorities for a position. There are no records of other applicants for the jobs secured by Clerkly, Richardson, and Harrison. Id., pp. 1-2. The applicant pool for Blades' position consisted of three minorities. Id., p. 7. The applicant pool for Williams' position consisted of four people, three of whom were minorities. Id., p. 8. The applicant pool for Meeks' position consisted of six persons, five of whom were minorities. Id.

44. Thus, in no case did an African American compete against more than token White opposition for a job. The only jobs for which African Americans were hired were essentially set aside for them -- and these jobs were only receptionist, secretarial or janitor positions.

45. KFUD's records do not not show a single minority applicant for a parttime position. KFUD Ex. 4, Tab 6, pp. 9-15. Nor do KFUD's records show a single African American applicant for a fulltime, nonsecretarial, nonjanitorial position during the license term. Tr. 514.

46. The institutional memory of KFUD was maintained by Devantier (see ¶12 supra) and Dennis Stortz. Stortz was the Stations' Operations Manager from 1978 through 1991 and their Acting General Manager from July, 1986 through May, 1987. KFUD Ex. 4, p. 1.

47. Stortz could recall no African American job applicant for a nonsecretarial, nonjanitorial position during the license term. Tr. 514. Neither could Devantier, who discussed minority applications with each of KFUD's general managers throughout the license term. Tr. 820, 822-26. 880.

D. Written EEO Policies Of The Stations

48. Devantier's written testimony maintained that upon assuming the responsibility as "CEO" in 1986, he

took steps to assure that the Church's policy of nondiscrimination and equal opportunity was in effect at the Stations. For example, I assured that the Church's employment manual, containing a statement concerning Equal Employment Opportunity, was put in effect at the Stations and was distributed to all employees.

KFUD Ex. 7, pp. 8-9 ¶17.

49. That manual, entitled "Employee Handbook", carried the notation "Published October 1985" on its first page. Id., Tab 4, p. 1. Devantier's statement did not explain why the Handbook had not been in effect at the Stations until 1986. Indeed, Devantier does not speak to why, as "liaison" to the Stations before 1986 (when the Stations reported to the Board for Lutheran Radio) he did not put the Synod's employment manual into effect at the Stations.

50. In any event, the Handbook hardly emphasizes equal employment opportunity. Its Table of Contents contains 53 subheadings on such subjects as "Office Hours and Breaks", "Dress and Appearance" and Leaves of Absence." The EEO policy only appears as one of the three Appendices. Some conception of the relative importance placed on EEO policy may be derived from the nature of the other two appendices: they are entitled "Christmas Gifts" and "Rental and Utility Allowance for Ministers of Religion." Id., Tab 4, p. 2-3.